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OCTOBER TERM, 1996

BERNADINE SUITUM, PETITIONER

v.

TAHOE REGIONAL PLANNING AGENCY, RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION AND THE NEVADA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amici address the following question:

Whether the first prong of *Williamson County*'s ripeness test, properly interpreted, deprives a landowner of a federal forum for her Fifth Amendment takings claim, where the challenged regulation destroys all normal beneficial uses of her property but grants transferable intangible rights, the value of which may readily be determined.

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INTERESTS OF THE AMICI*

The American Farm Bureau Federation ("AFBF") is a voluntary general farm organization established in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and Puerto Rico, representing more than 4.4 million member families. AFBF has participated as an amicus in this Court in support of property rights in cases such as *Lucas* v. *South Carolina Coastal Council*, *Dolan* v. *City of Tigard*, *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, and *Bennett* v. *Spear*. Amicus Nevada Farm Bureau Federation is a constituent member of AFBF, representing the interests of farmers and ranchers in the State of Nevada, where the property at issue in this case is located.

The AFBF and Nevada Farm Bureau Federation have a direct stake in the outcome of this case. Their farmer and rancher members own or lease significant amounts of land, on which they depend for their livelihoods and upon which all Americans rely for food and other basic necessities. That land is subject to increasingly onerous regulation by federal, state, and local authorities. Amici are, therefore, vitally interested in the procedural rules governing litigation under the Just Compensation Clause, which requires compensation for takings when such regulation goes "too far."

In particular, amici believe it essential that the complex and difficult-to-understand procedural rules that lower courts have derived from *Williamson County* and its progeny—rules that plant a minefield around the courthouse door for even the best represented landowner—should be simplified and

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* The consents of the parties to the filing of this amicus brief are on file with the Clerk.

made fairer. These rules evidence a ripeness doctrine spun out of control. Before they may bring a claim for compensation in federal court, landowners not permitted to make the most productive use of their land must endure

- applications and multiple reapplications for permission to engage in ever more restricted and less economically viable uses of their private property, in order to obtain a "final" agency decision;
- whole new bureaucratic avenues for "relief," created by regulatory agencies more with a view to avoiding a takings judgment than to permitting reasonable uses of land;
- multiple levels of costly state court litigation to determine if state law provides compensation for the land-use restriction; and
- the esoteric question whether to make an *England* reservation of federal rights in state court proceedings, which—in the unlikely event that res judicata, collateral estoppel, or the sheer expense of a second round of litigation do not prevent it—may conceivably allow the landowner to bring a takings claim in federal court years in the future, after all the steps just listed have been completed.

The Ninth Circuit's unduly rigid application of the "final decision" prong of the ripeness rules and its pinched interpretation of the "futility" exception to ripeness requirements have the practical effect not simply of delaying a landowner's federal takings claim but of barring access to a federal forum altogether. Many farmers, ranchers, and other landowners, even when they are able to untangle the rules to understand exactly what must be done to ripen a Fifth Amendment claim, cannot afford the substantial resources of time and money required to endure the multiple applications to

government agencies (still less the lengthy state judicial proceedings) that are currently the predicate for a federal takings suit.

Amici are particularly concerned that, if this Court endorses the Ninth Circuit's approach to ripeness, the government delaying tactics currently rife in the development field will spread to areas of primary concern to farmers and ranchers. These include decisionmaking on Clean Water Act Section 401 and 404 wetlands permits, grazing permits, and Endangered Species Act incidental take permits.

The severe procedural limitations on landowner suits constructed by the lower courts would be wholly unrecognizable to the Framers of the simple and direct mandate of the Just Compensation Clause. Amici have a strong interest in seeing this Court rein in the excesses of the ripeness doctrine to accord America's farmers and ranchers a fair opportunity to vindicate their federal rights to just compensation in a federal forum.

ARGUMENT

Amici fully agree with petitioner that, correctly analyzed, this case presents a clear example of a "categorical" taking under *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), because the Tahoe Regional Planning Agency ("TRPA") has "denie[d] all economically beneficial or productive use of [petitioner's] land." *Lucas* at 1015. TRPA's creation of an abstract and inchoate set of transferable development rights ("TDRs") leaves Mrs. Suitum with no economically meaningful *use* of her land at all. Just as in *Lucas*, she has been told that her parcel must "be left substantially in its natural state"—a restriction that this Court said "typically" leaves an "owner of land without economically beneficial or productive options for its use." 505 U.S. at 1018. *Lucas*'s *per se* rule cannot be evaded by TRPA's invention of rights that, although they conceivably may have

some economic value, in no sense constitute a "use" of the parcel to which they attach. Since petitioner's TDRs have no impact on her ability to make productive use of her land—use of which she has now been entirely deprived—she need not, following *Lucas*, pursue any administrative procedures associated with those TDRs to ripen her claim.

Petitioner's arguments on this score are persuasive; amici will not repeat them here. Rather, amici focus on how the Court should approach this case if it concludes that the takings analysis properly proceeds in terms not of "use" but of "*value*." There are three distinct and independent reasons why, even if Mrs. Suitum's TDRs provided her with some value, and value is the correct locus of takings analysis, the Ninth Circuit erred in refusing to address the merits of her Fifth Amendment claim.

First, the ripeness doctrine established in *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985), now stands as a substantial obstacle—often the most substantial obstacle—to a landowner's ability to obtain just compensation for Fifth Amendment takings. Amici demonstrate in Part I that lower courts interpret this doctrine in an unreasonably stringent manner. Amici urge this Court to make clear that ripeness rules are to be applied not rigidly but pragmatically and with due regard to all the particular circumstances, including the harm that the plaintiff landowner will suffer if consideration of her takings claim is delayed.

Second, amici show in Part II that, even within the existing *Williamson County* framework, the Ninth Circuit reached the wrong result because it construed the "futility" exception to the final-decision rule far too narrowly.

Finally, in Part III, amici demonstrate that the Ninth Circuit's erroneous refusal to recognize that "partial takings" are compensable led it to a mistaken belief that petitioner's

claim turns on whether her land has *any* remaining value. This caused the court to attach undue importance to the question whether transfer of Mrs. Suitum's TDRs might be permitted, thereby allowing her to recover a small part of her investment. In fact, the transferability of Mrs. Suitum's TDRs impacts, at most, the amount of just compensation she is entitled to and should have no effect on the ripeness of her claims.

The value of Mrs. Suitum's rights in her land is subject to proof in the normal way. Both the minimum and maximum diminutions in value resulting from TRPA's regulation are readily determinable and certainly substantial. Since Mrs. Suitum *already incurred* the *minimum* loss of value that could result from TRPA's regulatory scheme when TRPA determined that she could not make economic use of her land but could only seek to sell her TDRs, and since the amount of *that* loss is ascertainable without reference to any TRPA decision about transfer of TDRs, petitioner should be able to pursue her compensation claim immediately. Moreover, in these circumstances we see no good reason why petitioner should not also be able to obtain a declaratory judgment as to the Fifth Amendment consequences if TRPA should deny her the right to transfer her TDRs in the future.

I. TOO RIGID APPLICATIONS OF *WILLIAMSON COUNTY*'S RIPENESS REQUIREMENTS UNDERMINE THE GOALS OF THE JUST COMPENSATION CLAUSE

This Court has rejected the notion that "the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." *Dolan* v. *City of Tigard*, 114 S. Ct. 2309, 2320 (1994). Yet the imposition of uniquely burdensome ripeness rules on takings claims has precisely that result. As a practical matter, takings

plaintiffs—unlike plaintiffs alleging violations of First or Fourth Amendment rights—simply cannot get into court, even when they clearly have suffered serious harm. If property rights are to be afforded the same degree of protection as other fundamental constitutional rights, the ripeness limitations on takings suits must be applied in a more commonsense and flexible manner. See Mixon, *Compensation Claims Against Local Governments for Excessive Land-Use Regulations*, 20 Urb. Law. 675, 687 (1988) ("One need not take sides in the dispute between city hall and over-regulated landowners to recognize that the delay inherent in obtaining review of land-use regulations is as much a part of the costly problem as the substantive issue of liability").

A. Current Ripeness Rules Unjustifiably Weaken Landowners' Fifth Amendment Rights

Article III requires that a federal court claimant suffer "injury in fact" and present a genuine "case or controversy." Beyond that basic minimum, however, procedural requirements designed to ensure that a case is "ripe" for judicial review are "prudential" in nature. *Lucas*, 505 U.S. at 1012-1013. The "basic rationale" of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967). To that end, this Court has said, outside the takings context, that the ripeness "problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149.

Abbott Laboratories teaches that the goals of the ripeness inquiry are ill served by using a set of rigid and invariable rules and demand instead that courts take a "flexible view of finality" and other ripeness considerations. 387 U.S. at 150. Whether a dispute is ready for judicial determination often depends on the specific facts and history of the case—on details that cannot adequately be captured in a fixed ripeness rule of general application.

Too often, the lower courts, including the Ninth Circuit in this case, have lost sight of this need for flexibility when applying the *Williamson County* ripeness guidelines for takings cases. The *Williamson County* rule for determining whether a federal takings claim is ripe for federal court adjudication has two prongs. The first prong, on which petitioner became impaled, requires that a would-be takings claimant obtain "a final, definitive [decision from the government agency] regarding how it will apply the regulations at issue to the particular land in question." 473 U.S. at 191. The second requires the claimant to exhaust state court possibilities of obtaining just compensation before filing a takings claim in federal court. In applying these guidelines, many lower courts have disregarded the *Abbott Laboratories* admonition that they also take into account "the hardship to the parties" when evaluating ripeness. Moreover, they have failed to pay heed to this Court's caution in *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340, 350 n.7 (1986), a decision on the ripeness of a takings claim *subsequent* to *Williamson County*, that the ripeness doctrine does not require a property owner to resort to "unfair procedures" in order to bring a takings claim to federal court. As a result, all but a small fraction of federal constitutional land use claims have been found unripe and thus not justiciable in federal court. See Blaesser, *Closing the Federal Courthouse Door on Property Owners*, 2 Hofstra Prop. L.J. 73, 91

(1988) (only 5.6% of land use cases were found to be ripe in the period from 1983 to 1988).

The reasoning behind the "final decision" requirement is that a takings claim depends on showing that a regulation "goes too far," and that "a final and authoritative determination of the type and intensity of development legally permitted" on the property is therefore "essential," because "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald*, 477 U.S. at 348. TRPA's requirement that a property owner like Mrs. Suitum, who has been deprived of all possible use of her property, sell TDRs and seek agency approval of *another* property owner's right to use them does not serve that purpose. A court can determine "how far the regulation goes" without that additional, surplus, and ridiculously burdensome step. The fact is, as the district court found, that Mrs. Suitum "may not develop or build on the parcel of land she owns." Pet. App. D3. That is enough for a court to determine "how far the regulation goes." And even if the locus of the inquiry into whether regulation has gone "too far" is the value of Mrs. Suitum's TDRs, the maximum value of those rights is determinable in the usual way, so that there is no need to delay litigation of Mrs. Suitum's takings claim. See Part III, *infra*.

Ripeness rules that are too rigid invite government agencies to concoct insurmountable and interminable conditions to finality. This Court's Takings Clause decisions repudiate such "gimmickry." *Dolan* v. *City of Tigard*, 114 S. Ct. 2309, 2317 (1994). TRPA's intricate and unwieldy TDR scheme certainly appears crafted as just such a tactical ploy, and the decision of the court below can only encourage the proliferation of similar devices. Other examples abound. In *Villas of Lake Jackson, Ltd.* v. *Leon County*, 796 F. Supp. 1477 (N.D. Fla. 1992), for example, developers expended a great deal of time, money, and resources building infrastructure for a multi-family home project, relying on the county's permission to do so. But when they applied for the permits necessary to complete the project, and despite their having satisfied existing requirements for such permits, the county passed an ordinance changing the requirements. In a Kafkaesque scenario lasting some seventeen years, the developers would meet the new requirements and apply for the necessary permits, only to have the county pass yet more stringent ordinances and deny their applications. Finally, the county abolished the existing multi-family designation, changing it to single-family and leaving the developers high and dry. The court, in a vivid display of inflexible adjudication, denied the developers' takings claim as unripe because they had not "requested approval of single family development." 796 F. Supp. at 1481.

Such game-playing by government agencies, seeking to fend off takings claims, commonly extends the resolution of land use disputes for years or even decades. See, *e.g.*, *Corn* v. *City of Lauderdale Lakes*, 95 F.3d 1066, 1067 (11th Cir. 1996) (addressing "for the fourth time a 20-year-old dispute" over whether denial of zoning approval to build a mini-warehouse constituted a taking). These lengthy delays—just to obtain a "final decision" and thereby open the courthouse door to a claim for just compensation—commonly result in irreparable harm to property owners. After all, most landowners depend on financing arrangements that are highly sensitive to delays in the permitting process. The stretching of the ripeness time-frame, resulting from an unyieldingly rigid ripeness doctrine, effectively creates a means test for entry into federal court: only those with huge financial resources and the stamina to outlast government bureaucracies can hope to satisfy this test of endurance. See Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. Western L. Rev. 1, 11 (1992) ("The time and money required to

comply with myriad ripeness requirements will prevent most middle-class property owners from pursuing their constitutional right to just compensation [and] make substantive review virtually impossible"). Long delays are now frequently and unthinkingly treated as the norm. *E.g.*, *Landmark Land Co.* v. *Buchanan*, 874 F.2d 717, 721-722 (10th Cir. 1989) (calling eight-month delay by agency "strikingly short").

In sum, the "final decision" requirement, as it was applied to Mrs. Suitum and is being applied to many other property owners like her, is no longer limited to its proper justiciability function; rather, it is being wielded so as to determine *outcomes* of land use disputes, always in favor of the regulators. Many property owners have no choice but to throw in the towel and relinquish rights supposedly guaranteed by the Constitution. See Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 43 (1995) ("Practically speaking, the universe of plaintiffs with the financial ability to survive the lengthy ripening process is small"). That is certainly not what this Court intended when it developed the *Williamson County* ripeness test. Otherwise, Mr. Lucas, who never sought a final agency decision on whether he could build houses on his property, could never have appeared before this Court. And it is certainly not what the Framers intended when they inscribed in the Nation's founding charter an interdiction against the taking of private property without just compensation. Landowners' experiences in the lower courts since this Court decided *Williamson County* demonstrate an urgent need for a more flexible approach to ripeness.

B. This Court Should Establish More Flexible And Pragmatic Tests For Finality In Takings Cases

This Court should take the opportunity offered here to remind the lower courts that, in takings cases no less than

other suits, finality is to be given a flexible construction so as to facilitate—not preclude—informed federal court review of federal claims. At this point, neither litigants nor government agencies have sufficient guidance as to what constitutes a final decision for ripeness purposes in the land use area. Thus, as one commentator notes, it is not "possible to ascertain in advance exactly when a federal court will find a given case to be ripe." Stein, *supra*, 48 Vand. L. Rev. at 25.[1]

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[1] As further evidence of the mind-numbing complexities of current ripeness doctrine, many very basic questions regarding the meaning of the final decision requirement remain unresolved. For example: From which decisionmaker must one obtain a final decision? See *Unity Ventures* v. *Lake County*, 841 F.2d 770, 775 (7th Cir. 1988) (no final decision where denial of approval to develop property came from state, rather than city, agency). What is a "meaningful" application? Must a landowner seek a variance even if none is available, for example, where a variance is barred by ordinance? See *Shelter Creek Dev. Corp.* v. *City of Oxnard*, 838 F.2d 375, 379 (9th Cir. 1988) (requiring application for an unavailable variance). How many reapplications and attempts to obtain variances are necessary? See *Unity Ventures*, 841 F.2d at 775; *Kinzli* v. *City of Santa Cruz*, 818 F.2d 1449, 1452 (9th Cir. 1987). Does only the application that is denied *last* constitute the final decision? If so, does a property owner waive his or her claim for compensation for what he or she lost due to the earlier denials? How is the final decision requirement distinct from exhaustion of agency remedies? In *Williamson County*, this Court stated that exhaustion, in the form of agency review, is not necessary (473 U.S. at 192), yet lower courts continue to rule takings claims unripe where the claimant did not pursue agency appeals. *E.g.*, *Acierno* v. *Mitchell*, 6 F.3d 970, 976, 977 (3d Cir. 1993). One court went so far as to find no final decision under prong one where the property owner had not sought administrative review by a state *court*. *Herrington* v. *City of Pearl*, 908 F. Supp. 418, 424 (S.D. Miss. 1995). Uncertainty as to such fundamental issues

Under current doctrine, there is inevitably uncertainty about whether there has been "a final decision regarding how [a property owner] will be allowed to develop its property," hence about what value has been taken by regulatory action and what value remains in the property. *Williamson County*, 473 U.S. at 190. *Planning agencies do not advise owners what they can do with their property*, but limit themselves to making decisions on particular applications. When an application for a particular use is denied, the owner is rarely any the wiser about what use *would* be permitted by the agency. The owner is instead required to amend his or her application and try again. A ripeness rule requiring that a final decision be obtained precisely determining how the property may be used is unreasonable, because it forces the owner to reapply to the agency multiple times, each time seeking more restrictive and less economically viable uses. It allows the agency, on the other hand, simply to sit back and withhold any statement of what use it would permit, knowing full well that this will derail any takings inquiry into the loss of value that the landowner has incurred.

We suggest that the Court tailor the final decision requirement to its proper purpose of ensuring that a case is, in a *practical* sense, ready for judicial review. See Roberts, *Ripeness and Forum Selection in Land-Use Litigation*, in *Takings: Land-Development Conditions and Regulatory Takings after* Dolan *and* Lucas 46, 56 (D. Callies ed., 1996) ("the rule ought not force the developer to make repeated, increasingly meager requests to make a claim ripe"). First, a more flexible formulation for what constitutes a final decision should be adopted. The Court's formulation in *Franklin* v. *Massachusetts*, 505 U.S. 788, 797 (1992)—"[t]he core question is whether the agency has completed its

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makes takings litigation a crapshoot, and the sort of gamble that most property owners simply cannot afford.

decisionmaking process, and whether the result of that process is one that will directly affect the parties"—gets to the heart of the matter without imposing the counterproductive rigidity that courts have read into *Williamson County's* statement that there must be a final determination about how the land can be used. There are cases in which an agency's elimination of *some* planned uses may affect the property to such an extent that a taking has occurred, even if some other use might possibly be allowed.

Second, a claim should be deemed ripe upon a showing by the property owner that he or she has sought a final decision with *reasonable diligence*. Depending on all the circumstances, this standard could well be met without an owner having to make all the reapplications necessary to pin the agency down on the issue of precisely how it would allow the property to be used.

As an example of how these standards ought to work, suppose that a municipality hears that a farmer is planning to develop for single-family residential use land that is currently zoned single-family but that has previously been used only for raising crops. The municipality precipitously changes the zoning of that property from single-family to agricultural use or open space. The farmer then applies for and is denied approval of a single-family development. In those circumstances, the farmer's takings claim should be considered ripe: it would be unreasonable to require application for a variance or reapplication for some other use when the actions of the municipality leave its intentions quite clear.

In addition to adopting these more practically-oriented general rules of finality in takings cases, this Court should also recognize equitable exceptions to the final decision requirement. As we discuss in Part II, *infra*, as one aspect of this improvement the futility exception should be fleshed out so that useless applications are no longer required. But this

Court should also adopt two additional equitable exceptions to the usual ripeness requirements.

The first exception, which we believe is required by *Abbott Laboratories*, should be for cases where significant harm to claimants is demonstrated. Under this hardship exception, for example, if a landowner who has taken reasonable steps to obtain a permit can demonstrate that he or she lacks the means to pursue further applications, the last decision by the agency is necessarily a final one and should be subject to constitutional challenge. And even where a landowner has the means to pursue additional applications, at some point courts must recognize that the owner's expenditures already made on planners, architects, soil analysts, engineers, lawyers, and others are enough, and that no more applications will be required.

Particularly relevant in this case, a second equitable exception should be recognized where there is evidence of strategic behavior by regulators. Courts should not accept at face value odd and elaborate schemes like TRPA's program of TDRs, which operate as barriers to a takings suit but serve no further purpose. When a scheme of newly-created rights looks like a strategic way to keep a takings claim unripe rather than a genuine effort to bring relief to landowners, it makes a mockery of the Constitution to require strict compliance with that scheme to ripen a Fifth Amendment claim. Here, the essential oddity and impracticability of the TDR scheme, combined with Mrs. Suitum's expert evidence that no owner had been able to make use of the TDR program, showed that it was merely a ruse and a sham.[2]

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[2] The courts below wrongly held that the affidavit of Mrs. Suitum's expert, Paul Kaleta, should be excluded because he was not a qualified appraiser. Pet. App. A10-A11. This misses the point. As a former TRPA staff member, Mr. Kaleta was well qualified to testify as to whether the TDR program was a sham. He testified that the chance of Mrs. Suitum receiving a building allocation was "minuscule," that each of the six allocations issued in Washoe County in 1993 "were returned back to Washoe County because there was no market for the transferable allocations and they could not be sold," and that "[n]o market exists" for development rights and associated bonus units. Kaleta Aff., ¶¶ 4-6. This evidence was highly relevant to the issues of whether the TDR scheme was a sham and whether an application pursuant to that scheme would have been futile, and it should not have been excluded.

Finally, amici suggest in addition that this Court should make clear that a property owner may seek a federal court declaratory judgment that a regulation or its application constitutes a taking, as opposed to a judgment for compensation, whether or not the claimant has applied for all possible variances and reapplications. See *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 71 n.15 (1978); *New Orleans Public Service, Inc.* v. *New Orleans*, 491 U.S. 350, 372 (1989). As a practical matter, the possibility of an early judicial look at the merits of a takings claim would likely encourage more realistic and open behavior on the part of the land use agency and make delaying tactics less attractive. It should cause agencies to be more forthcoming about what uses they *would* allow on the property, and more helpful to landowners in suggesting ways in which plans could be modified to meet approval.

By such measures, the Court would restore balance to ripeness analysis and thereby head off a deviant doctrine, epitomized by the decision below, "which gives to monied might, the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope" as to leave property owners "perennially hopeless." Charles Dickens, *Bleak House* 3, 4 (Alfred A. Knopf ed., 1991).

Property rights are too important to "be relegated to the status of a poor relation." *Dolan*, 114 S. Ct. at 2320. There is no valid reason why ripeness requirements should permit the vindication of constitutional property rights only in the most extraordinary circumstances. A right lacking a practical means of vindication is but an empty shell. This Court should ensure that Mrs. Suitum—and all reasonably diligent property owners with a plausible takings claim—are not capriciously barred from federal court.

II. UNDER A PROPERLY PRAGMATIC APPROACH TO THE FUTILITY DOCTRINE, PETITIONER'S TAKINGS CLAIM IS RIPE

Although this Court has never addressed in any detail the futility exception to *Williamson County*'s finality requirement, there can be little doubt that such an exception exists. Writing for four members of the Court in dissent in *MacDonald*, Justice White stated that while "a landowner must pursue reasonably available avenues that might allow relief, it need not * * * take patently fruitless measures." "Nothing in [this Court's cases]," Justice White observed, "suggests that the decisionmaker's definitive position may be determined only from explicit denials of property-owner applications for development. Nor do these cases suggest that repeated applications and denials are necessary to pinpoint that position." 477 U.S. at 359. Subsequently, in *Lucas*, a majority held that Mr. Lucas' failure to submit a plan for development was *not* a bar to reaching the merits of his takings claim, because "such a submission would have been pointless." 505 U.S. at 1012 n.3.

The question whether the pursuit of agency approval for a land-use project would be "patently fruitless" because the agency has already indicated its "definitive position" is, we suggest, a factual one, properly dependent on all the circumstances. There is no conceivable warrant for restricting the

breadth of that inquiry through arbitrary formulas about what procedures a landowner must follow before he or she may make a futility argument. Although the lower federal courts have generally acknowledged that there is some sort of futility exception to finality, and have even, on occasion, found pleas to regulators to be futile, *e.g.*, *Eastern Minerals Int'l, Inc.* v. *United States*, 36 Fed. Cl. 541, 547 (1996); *Beure-Co.* v. *United States*, 16 Cl. Ct. 42 (1988), they have limited the scope of the exception for no discernable reason other than to restrict landowners' access to the federal courts. See, *e.g.*, *Traweek* v. *City & County of San Francisco*, 920 F.2d 589, 594 (9th Cir. 1990).

For example, most courts that have addressed the issue have concluded that the futility exception cannot apply until the landowner has made at least one application and that application has been denied. *E.g.*, *Eastern Minerals*, 36 Fed. Cl. at 548 ("Each plaintiff must satisfy the threshold requirement of a single meaningful application to maintain the futility exception"); *Southern Pac. Transp. Co.* v. *City of Los Angeles*, 922 F.2d 498 (9th Cir. 1990) (same); *Unity Ventures* v. *Lake County*, 841 F.2d 770 (7th Cir. 1988) (same). Under this rule, petitioner arguably could not have availed herself of the futility exception, because she had not yet had an application to transfer useable TDRs denied.

This "one unsuccessful application" gloss on the futility rule is insupportable—as is *any* arbitrary rule limiting a court's duty to inquire into all the facts relevant to the question whether the agency has definitively made up its mind. Justice White's observation that "[a] decisionmaker's definitive position may sometimes be determined by factors other than its actual decision on the issue in question" (*MacDonald*, 477 U.S. at 359) is assuredly true, and it cannot be limited to situations where one application (or some other arbitrary number) has been denied.

Eastern Minerals provides an example of the capricious results that flow from unduly restricting the futility inquiry. There, the government's statements made clear that *no* application to mine a particular seam of coal would be approved. The Court of Claims held ripe the takings claim of one owner, whose first permit had been denied, because the evidence showed that further applications would likewise be denied. But it held *unripe* the claims of a second owner who declined to make an application because he knew, from the experience of the first owner, that any application he made would be rejected. That ruling, amici submit, was in error. The test for futility should be a purely factual one: do the circumstances show that an application—even a first application—would be futile. The denial of another owner's application for reasons that admit of no exceptions and that apply equally to the plaintiff is enough, amici believe, to establish futility; and there are countless other ways in which futility might be shown in a particular case though no application had yet been denied.

A better, more flexible statement of the futility exception to finality, amici suggest, is that of the First Circuit in *Gilbert* v. *City of Cambridge*, 932 F.2d 51, 61 n.12 (1st Cir. 1991): the exception applies "where the degree of hardship that would be imposed by waiting for the permit process to run its course is so substantial and severe, and the prospects of obtaining the permit so unlikely, that the property may be found to be meaningfully burdened and the controversy concrete enough to warrant immediate judicial intervention." An important "hardship" factor in applying that standard is the plaintiff's current inability to make any use of the land. *Ibid.*

In Mrs. Suitum's case, the excluded evidence of her expert that the TDR scheme was a sham and that no market for TDRs actually existed was certainly relevant to the question of futility. See *supra*, note 2. If that evidence had been accepted—and as a former TRPA official the witness was surely well qualified—the court would have been forced to conclude that any effort by petitioner to sell her TDRs was futile. The futility exception should have applied in this case. More important for the development of the law in this area, this Court should disapprove the baseless constraints that lower courts have imposed on the futility inquiry and make clear that futility is a purely factual issue, subject to proof in innumerable ways and without arbitrary preconditions.

III. BECAUSE IT IS IMMEDIATELY DETERMINABLE THAT TRPA'S REGULATIONS DEPRIVED PETITIONER'S LAND OF MUCH OF ITS VALUE, HER TAKINGS CLAIM IS RIPE

The Ninth Circuit accepted TRPA's valuation of Mrs. Suitum's TDRs and excluded her expert's evidence that the whole TDR scheme was a sham and the TDRs had no market value. Though amici believe that this was error, even on that basis the court should have recognized that petitioner had a ripe takings claim. TRPA's evidence fixed the maximum value of the TDRs, and, combined with evidence of the value of Mrs. Suitum's lot *with* her right to build a single-family home, allowed calculation of the minimum loss that petitioner suffered as a result of the TDR scheme. The only remaining uncertainty was whether petitioner would in future suffer a *greater* loss if she were denied approval for the transfer of useable TDRs.

In those circumstances, where the minimum loss of value of property is fixed and the only issue is whether a greater loss will be incurred through future regulatory action, amici believe that a claim for a partial taking is ripe. Any other rule would be grossly unfair to landowners: government could prevent a takings claim simply by retaining the power to take *more* of the property in the future!

The Ninth Circuit did not even consider this ripeness question, for it made the fundamental mistake of denying that there is such a thing as a constitutionally cognizable partial taking. It held, inexplicably, that "[t]he imposition of regulatory ordinances that merely diminish the value of property does not constitute a taking." Pet. App. A12. It is important that this Court take the opportunity to correct this misinterpretation of the Fifth Amendment.

In *Lucas*, this Court held that a regulation that deprives the owner of a parcel of "*all* economically beneficial or productive use of [the] land" constitutes a taking and is "compensable without case-specific inquiry into the public interest advanced in support of the restraint." 505 U.S. at 1015 (emphasis added). Contrary to the Ninth Circuit, however, this sort of "categorical" taking is not the sole form of taking governed by the Fifth Amendment. *Lucas*'s categorical rule does not operate to the exclusion of the principle that a substantial diminution in value can also be a compensable partial taking.

In fact, the Court in *Lucas* refuted the dissent's contention that the categorical rule was arbitrary because "[a] landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value." *Lucas*, 505 U.S. at 1064 (Stevens, J., dissenting). The Court observed that "[t]his analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation." *Id.* at 1019 n.8. The Court noted that "[s]uch an owner might not be able to claim the benefit of our categorical formulation," but that "'[t]he economic impact of the regulation on the claimant and * * * the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally." *Ibid.*

Although this Court has not yet had occasion to flesh out the partial takings inquiry outlined in *Lucas*, the Federal Circuit has squarely addressed it and has concluded, contrary to the Ninth Circuit, that a substantial diminution in value may amount to a compensable partial taking. See *Florida Rock Indus., Inc.* v. *United States*, 18 F.3d 1560 (Fed. Cir. 1994) (finding that a taking may have occurred when the value of land was reduced by approximately sixty percent).[3] The Federal Circuit correctly noted that "[n]othing in the language of the Fifth Amendment compels a court to find a taking *only* when the Government divests the total ownership of the property; the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests." *Id.* at 1568.

The Ninth Circuit's unreasoned rejection of partial takings should not go uncorrected, since it appears to have infected the court's ruling on ripeness. The Ninth Circuit's failure to recognize that partial takings can be compensable led it to conclude that petitioner's takings claim turns on whether her land has some remaining value. Therefore, the court focused on whether petitioner would be permitted to

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[3] Far from being no such thing as a partial taking, there are two different situations in which, the Federal Circuit has recognized, compensation for a partial taking may be constitutionally required. The first is where there has been a substantial diminution in the value of the parcel as a whole, as occurred in this case and in *Florida Rock*. The second is where circumstances suggest that the dimunition-in-value inquiry is properly directed not at the entire parcel but at a discrete sub-unit of the parcel. That issue was addressed by the Federal Circuit in *Loveladies Harbor, Inc.* v. *United States*, 28 F.3d 1171 (Fed. Cir. 1994). See, *e.g.*, Lisker, *Regulatory Takings and the Denominator Problem*, 27 Rutgers L.J. 663 (1996); Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535 (1994).

transfer useable development rights and whether this transfer would result in a "mere" diminution in the value of petitioner's "bundle of rights" in the parcel, rather than in a compensable "total" taking. But if a less-than-complete diminution in value *can* be a compensable taking, there was no need for petitioner to go through the TDR process before stating a ripe takings claim. The value of Mrs. Suitum's land, both free from and subject to TRPA's regulatory scheme, was readily ascertainable. The *minimum* diminution in value was calculable by taking TRPA's own figures for the value of the TDRs, and the case presented the ripe question whether that diminution was substantial enough to amount to a compensable partial taking.[4]

Moreover, the *maximum* diminution in the value of petitioner's parcel is readily determinable as well, merely by

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[4] Mrs. Suitum and her late husband acquired the parcel at issue in 1972. On three sides of the parcel are lots with residences, and the fourth borders on a paved street. When petitioner submitted to TRPA in 1989 a plan to build a residence on the property, she was told that the parcel was in a Stream Environmental Zone ("SEZ"), and that no new land coverage was permitted there. The idea of an SEZ was created by the 1987 TRPA Plan, which was drafted pursuant to the 1980 Tahoe Regional Planning Compact. Pet. App. A4-A6. Thus, as in *Lucas*, Mrs. Suitum owned the parcel at issue prior to the imposition of the regulatory scheme that required her to leave her land in its natural state. Under the ad hoc test of *Penn Central*, it is important to consider both the "economic impact of the regulation" on petitioner and "the extent to which the regulation has interfered with [her] distinct investment-backed expectations." *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104, 124 (1978). The economic impact of TRPA's regulatory scheme on petitioner appears to be substantial; and, given her reasonable expectation, at the time of the purchase of the parcel, that she would be able to build a residence, there also has been an interference with her distinct investment-backed expectations.

assuming that TRPA in the future denies approval of the transfer of Mrs. Suitum's TDRs. It would be extremely wasteful of judicial and litigant resources if petitioner were not allowed to proceed with a declaratory judgment action, seeking a declaration that *if* TRPA were to disallow the transfer of useable TDRs, a compensable taking would then have occurred. Since petitioner's minimum and maximum losses are ascertainable now, it makes sense to allow a single action to go forward claiming compensation for a partial taking and a declaration that a complete taking will occur upon denial of the right to transfer petitioner's TDRs. A declaratory judgment will assist TRPA as well as petitioner, by enabling the agency to make a decision on her application to transfer TDRs with full information about the takings consequences of denying her application.

This case perfectly illustrates the incredibly burdensome procedural rules and substantive uncertainties that mar the law of takings, making a day in federal court an unlikely prospect for even the most overregulated landowner. Amici urge this Court to infuse this area with a healthy dose of reality, tying the rules of ripeness to the actual experience of landowners once they enter the regulatory maze. Change is essential to restore the promise of the Fifth Amendment that government may not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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